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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Hon. CATHY ANN BENCIVENGO

11 UNITED STATES OF AMERICA,) Case No. 07CR2531W
12 Plaintiff,) Mag. No. 07MJ2362
13 v.) MEMORANDUM OF POINTS AND
14 PADILLA, et. al.,) AUTHORITIES IN SUPPORT
15) OF VIDEOTAPE DEPOSITION
16) AND SUBSEQUENT VOLUNTARY
17) DEPARTURE OF MATERIAL
Defendant.) WITNESS
) DATE: November 29, 2007
) TIME: 9:30 A. M.
) DEPT: BENCIVENGO

I

BY STATUTE AND CASE LAW,

THE MOTION SHOULD BE GRANTED

According to 18 U.S.C. 3144, "no material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can be adequately secured by deposition and if further detention is not necessary to prevent a failure of justice".

26 Furthermore, Fed. R. Crim. P. 15(a) specifies that a material
27 witness may make a motion requesting such a deposition and the
28 district court has the authority to order the taking of the

1 deposition and thereafter to discharge the detained witness from
 2 custody.

3 As the Fifth Circuit stated in Aguilar-Ayala v. Ruiz, 973 F.2d
 4 411 (1992) at page 413:

5 Read together, Rule 15(a) and section 3144 provide a
 6 detained witness with a mechanism for securing his own
 7 release. He must file a "written motion", Fed. R. Crim.
 8 P. 15(a), requesting that he be deposed. The motion must
 9 demonstrate that his "testimony can adequately be secured
 10 by deposition" and that "further detention is not
 11 necessary to prevent a failure of justice" 18 U.S.C.
 12 section 3144. Upon such showing, the district court must
 13 order his deposition and prompt release. Id. ("No
 14 material witness may be detained" if he makes such a
 15 showing). Although Rule 15(a) is couched in the
 16 permissive "May" not the mandatory "shall", Fed. R. Crim.
 17 P. 15(a) ("the court...may direct that the witness'
 18 deposition be taken"), it is clear from a conjunctive
 19 reading with section 3144 that the discretion to deny the
 20 motion is limited to those instances in which the
 21 deposition would not serve as an adequate substitute for
 22 the witness' live testimony: that a "failure of justice"
 23 would ensue were the witness released...**absent a "failure
 24 of justice", the witness must be released.**

25 This is also the law in the Ninth Circuit as demonstrated by
 26 the very recent case of Torres-Ruiz v. United States District Court
 27 for the Southern District of California, 120 F3d 933 (9th Cir 1997).
 28 The court "agreed with the reasoning of [Aguilar-Ayala, supra]" and
 29 reversed Judge Huff who had denied a motion for a deposition on
 30 facts virtually identical to the instant action . As the court
 31 stated:
 32

33 In the instant case, two young men ages 19 and 22, have
 34 apparently been randomly selected out of a group of 27
 35 undocumented aliens and detained for a period of over 60
 36 days as material witnesses in a straightforward and
 37 uncomplicated alien smuggling prosecution. These young
 38 men state without opposition by either party to this case
 39 that they are the sole support for their respective
 40 families in Mexico, and that every day they remain in
 41 custody is a tremendous hardship on those family members.
 42 (Kilpatrick Declaration at 2) Neither petitioner is able
 43 to provide a surety for \$1000.00 bond. It is exactly
 44 circumstances such as these for which section 3144

1 appears to be designed.

2 Continued detention of the material witnesses after the video
3 deposition is not necessary because the videotaped deposition
4 itself is admissible evidence at trial, United States v. Canan 48
5 F. 3d 954 (6th Cir. 1995) cert. denied 116 S. Ct. 716 (1996); United
6 States v. Santos-Pinon 146 F 3d 734 (9th Cir. 1998).

7 Respectfully submitted,

8 DATED: November 15, 2007

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14 /s/
15 JONATHAN DAVID FRANK
16 Attorney for Material Witness
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